SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2002-014088 04/28/2003

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

THOMAS ALAN SCHUSTER KENT A LANG

v.

GREGG D OTTAVIO, et al. SID A HORWITZ

MONTGOMERY LEE
AZ REGISTRAR OF CONTRACTORS
OFFICE OF ADMINISTRATIVE
HEARINGS

MINUTE ENTRY

Pursuant to A.R.S §12-910(e) this court may review administrative decisions in special actions and proceedings in which the State is a party:

> The court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

The scope of review of an agency determination under administrative review places the burden upon the Plaintiff to demonstrate that the agency's decision was arbitrary, capricious, or involved an abuse of discretion.[1] Only where the administrative decision is unsupported by competent evidence may this court set it aside as being arbitrary and capricious.[2] A reviewing

[1] *Sundown Imports, Inc. v. Ariz. Dept. of Transp,*, 115 Ariz. 428, 431, 565 P.2d 1289, 1292 (App. 1977); *Klomp v. Ariz. Dept. of Economic Security*, 125 Ariz. 556, 611 P.2d 560 (App. 1980).
[2] *City of Tucson v. Mills*, 114 Ariz. 107, 559 P.2d 663 (App. 1976).

court may not substitute its own discretion for that exercised by an administrative agency,[3] but must only determine if there is any competent evidence to sustain the decision.[4]

This matter has been under advisement and the Court has considered and reviewed the record of the proceedings, exhibits made of record and the memoranda submitted.

In the case at hand, Plaintiff, a contractor, and Defendant entered into a series of contracts for a remodeling job. On October 9, 2001, Defendant filed a complaint in the Scottsdale Justice Court seeking damages for poor workmanship. The court entered a judgment in Defendant's favor for $2,519.00. Plaintiff's wages were garnished and Defendant recovered $227.52. On March 4, 2002, Defendant filed a recovery claim with the Registrar of Contractors seeking to recover damages concerning poor workmanship dissimilar from the claim in the Scottsdale Justice Court. The Recovery Fund approved a pay out to Defendant for $14,920.73. Plaintiff appeals the decision of the Registrar of Contractors.

Plaintiff first argues that A.R.S. §32-1136 restricts payment from the Recovery Fund to the unpaid balance due on the judgment entered January 16, 2002 in the Scottsdale Justice Court. This argument assumes findings that were not supported by the record. A close review of the record shows that the damages sought by Defendant in the Scottsdale Justice Court were different than those sought from the Recovery Fund. Therefore, Plaintiff's argument is misdirected. The statute does not preclude or restrict payment from the Recovery Fund in this case.

The second issue is whether *res judicata* and/or collateral estoppel bar award and payment from the Recovery Fund in excess of the unpaid balance due on the judgment entered January 16, 2002 in the Scottsdale Justice Court. The application of the doctrine of collateral estoppel requires that the following five conditions be met: 1) the issue was actually litigated in the previous proceeding; 2) there was a full and fair opportunity to litigate the issue; 3) resolution of the issue was essential to the decision; 4) there was a valid and final decision on the merits; and 5) there is common identity of the parties.[5] A party who has had one fair and full opportunity to prove a claim in a court of competent jurisdiction is prevented from bringing an action on the merits of the claim a second time.[6] Both the orderliness and reasonable time-saving of judicial administration require that this be so, unless there is some overriding consideration of fairness to a litigant,[7] which the circumstances of the particular case do not dictate. Under the doctrine of *res judicata*, a valid final judgment is conclusive on the parties or

---

[3] *Ariz. Dept.of Economic Security v. Lidback*, 26 Ariz. App. 143, 145, 546 P.2d 1152, 1154 (1976).
[4] *Schade v. Arizona State Retirement System*, 109 Ariz. 396, 398, 510 P.2d 42, 44 (1973); *Welsh v. Arizona State Board of Accountancy*, 14 Ariz.App. 432, 484 P.2d 201 (1971).
[5] *Irby Const. Co. v. Arizona Dept. of Revenue*, 184 Ariz. 105, 907 P.2d 74 (Ariz.App. 1995).*Chaney Bldg. Co. v. Tucson*, 148 Ariz. 571, 573, 716 P.2d 28, 30 (1986); *Gilbert v. Board of Medical Examiners*, 155 Ariz. 169, 174, 745 P.2d 617, 622 (App.1987).
[6] *Di Orio v. City of Scottsdale*, 2 Ariz.App. 329, 408 P.2d 849 (Ariz.App. 1965).
[7] *Id*.

their privies as to every issue decided and every issue raised by the record that the court could have decided.[8] The Restatement (Second) of Judgements[9] and the clear majority of courts employ a "transactional" test for determining whether the causes of action are the same.

> [T]he prevailing view in the courts is in favor of requiring a plaintiff to present in one suit all of the claims for relief that he may have against the defendant arising out of the same transaction or occurrence. If the plaintiff had such an opportunity to litigate in the first action, its second attempt should be--and generally is--barred. The transactional test prevents what virtually all courts agree a plaintiff should not be able to do: revive essentially the same cause of action under a new legal theory. [10]

Nonetheless, Defendant correctly argues that *res judicata* and collateral estoppel are affirmative defenses that preclude the re-litigation of *identical* issues. Here, the issues litigated were *not* identical, as the record clearly shows; the claims concerned different issues entirely. Therefore, these common law doctrines are irrelevant to this matter.

When reviewing the sufficiency of the evidence, an appellate court must not re-weigh the evidence to determine if it would reach the same conclusion as the original trier of fact.[11] All evidence will be viewed in a light most favorable to sustaining a judgment and all reasonable inferences will be resolved against the Appellant.[12] If conflicts in evidence exist, the appellate court must resolve such conflicts in favor of sustaining the judgment and against the Appellant.[13] An appellate court shall afford great weight to the trial court's assessment of witnesses' credibility and should not reverse the trial court's weighing of evidence absent clear error.[14] When the sufficiency of evidence to support a judgment is questioned on appeal, an appellate court will examine the record only to determine whether substantial evidence exists to support the action of the lower court.[15] The Arizona Supreme Court has explained in *State v. Tison*[16] that "substantial evidence" means:

---

[8] *Pima County Assessor v. Arizona State Bd. of Equalization*, 195 Ariz. 329, 987 P.2d 815, 305 Ariz. Adv. Rep. 23 (Ariz.App. 1999); *Hall v. Lalli*, 194 Ariz. 54, 977 P.2d 776, 299 Ariz. Adv. Rep. 9 (Ariz. 1999); *Heinig v. Hudman*, 177 Ariz. 66, 865 P.2d 110 (Ariz.App. 1993).

[9] §24 (1982).

[10] *Phoenix Newspapers, Inc. v. Department of Corrections, State of Ariz.,* 188 Ariz. 237, 241, 934 P.2d 801, 805, 239 Ariz. Adv. Rep. 17 (Ariz.App. 1997).

[11] *State v. Guerra*, 161 Ariz. 289, 778 P.2d 1185 (1989); *State v. Mincey,* 141 Ariz. 425, 687 P.2d 1180, cert. denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed.2d 409 (1984); *State v. Brown*, 125 Ariz. 160, 608 P.2d 299 (1980); *Hollis v. Industrial Commission,* 94 Ariz. 113, 382 P.2d 226 (1963).

[12] *Guerra,* supra; *State v. Tison*, 129 Ariz. 546, 633 P.2d 355 (1981), cert. denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982).

[13] *Guerra*, supra; *State v. Girdler,* 138 Ariz. 482, 675 P.2d 1301 (1983), cert. denied, 467 U.S. 1244, 104 S.Ct. 3519, 82 L.Ed.2d 826 (1984).

[14] In re: Estate of Shumway, 197 Ariz. 57, 3 P.3rd 977, review granted in part, opinion vacated in part 9 P.3rd 1062; *Ryder v. Leach*, 3 Ariz. 129, 77P. 490 (1889).

[15] *Hutcherson v. City of Phoenix,* 192 Ariz. 51, 961 P.2d 449 (1998); *State v. Guerra*, supra; State ex rel.

> More than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.[17]

This court affirms the administrative agency's decision, for it was clearly supported by substantial evidence.

IT IS ORDERED affirming the decision of the Registrar of Contractors.

IT IS FURTHER ORDERED DENYING all relief as requested by the Plaintiff in his complaint.

IT IS FURTHER ORDERED that counsel for the defendant shall prepare and lodge a judgment consistent with this minute entry opinion no later than June 1, 2003.

Herman v. Schaffer, 110 Ariz. 91, 515 P.2d 593 (1973).
[16] SUPRA.
[17] Id. at 553, 633 P.2d at 362.